IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 22-0123

BRETT CAMEN,

Plaintiff/Appellant,

-vs-

GLACIER EYE CLINIC, P.C. and
KALISPELL REGIONAL MEDICAL CENTER, INC.,

Defendants/Appellees.

APPELLEE GLACIER EYE CLINIC, P.C.'S RESPONSE BRIEF

Appealed from the Eleventh Judicial District of the
State of Montana, in and for the County of Flathead
Cause No. DV-15-2019-361D, Hon. Dan Wilson

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STATEMENT OF THE CASE

Brett Camen ("Camen") appeals a judgment entered on the jury's verdict in favor of Kalispell Regional Medical Center, Inc. ("KRMC" or "Dr. Wheeler") and this defendant, Glacier Eye Clinic, P.C. ("GEC" or "Dr. Stein"). Camen alleged Dr. Wheeler, a pediatric neurologist, and Dr. Stein, a pediatric ophthalmologist, breached applicable standards of care by failing to timely diagnose and treat Camen. Finding no negligence on the part of either Dr. Stein or Dr. Wheeler, the jury returned a special verdict in favor of Defendants after seven days of trial. (Dkt. 140.1; GEC App. 292.)

On appeal, Camen urges this Court to overturn the jury's decision and order a new trial. He claims: (1) the district court erred by refusing two jury instructions;

(2) the district court abused its discretion with respect to certain evidentiary rulings during Dr. Wheeler's testimony; and (3) the jury polling was improper.

STATEMENT OF FACTS

Medical care prior to Dr. Stein's involvement

On November 23, 2017, Thanksgiving, Camen started experiencing severe headaches. (Trans. 521.) His vision suddenly changed on December 15. At school, Camen noticed he could not read normally. Driving home, Camen started seeing double. Camen's mother took him to the urgent care clinic in Libby. (Trans. 522-23, 1466.) Camen continued to experience headaches and vision issues and went to the Cabinet Peaks emergency room on December 17, where providers performed a CT scan. (Trans. 1466-67; GEC App. 9.) The scan was negative. (Trans. 818, 1022; GEC App. 26, 52.)

Camen also saw his optometrist, Steven Sorensen, on December 18. (Trans. 636-37, 645.) Dr. Sorensen detected flame hemorrhages, which occur where blood vessels in the retinal nerve head rupture, resulting in bleeding that resembles a flame. (Trans. 650-51; Lee Perpetuation Depo. 110; GEC App. 16, 112.) Dr. Sorensen also noted papilledema, swelling of the optic nerve caused by increased intracranial pressure. (Trans. 790; GEC App. 23.) Dr. Sorensen's findings prompted him to contact Dr. Wheeler on December 19. (Trans. 703; GEC App. 17.) Dr. Sorensen

performed automated visual field testing on December 20 to gather more information. (Trans. 707; GEC App. 18.)

On December 19, Camen's primary care provider, PA Matthew Bauer, contacted Dr. Wheeler. (Trans. 1283; Bauer Perpetuation Depo. 11-12; GEC App. 59, 94.) Dr. Wheeler recommended a brain MRI and lumbar puncture, both of which PA Bauer ordered. (Bauer Perpetuation Depo. 15-16; Trans. 1098; GEC App. 95, 57.)

A December 21 lumbar puncture revealed elevated intracranial cerebral spinal fluid (CSF) pressure. (Trans. 819, 1123; GEC App. 26, 58.) Dr. Wheeler spoke with PA Bauer and recommended the medication Diamox to lower Camen's intracranial pressure. (Trans. 1120; GEC App. 58.)

Camen saw PA Bauer for follow-up on December 27. Camen reported his headache improved three days after starting the medication, and his vision was slightly better. (Trans. 580-81; Bauer Perpetuation Depo. 48; GEC App. 11-12, 96.)

On December 28, ten days after examining Camen, Dr. Sorensen mailed a letter by regular U.S. mail to Dr. Alme, a retinal specialist and one of Dr. Stein's colleagues at GEC.[1] (Trans. 744-45; Ex. PL 2-53; GEC App. 19, 92.) Dr. Sorensen's letter advised of his recent examination of Camen. (Ex. PL 2-53; GEC App. 92.) Dr. Sorensen described Camen as "suffering from severe Headaches since Thanksgiving

[1] The parties stipulated to the admission of Dr. Sorensen's letter into evidence. (GEC App. 257).

and just recently has noticed blur in his vision." (*Id.*) Dr. Sorensen stated in his letter that Camen's acuities were 20/40 and 20/60 without correction, that examination showed severe "Papilledema OU," and that Camen had a recent negative CT scan. (*Id.*) Dr. Sorensen noted that he had contacted Dr. Wheeler, who had started Camen on Diamox. (*Id*.)

Dr. Sorensen's letter, which GEC received on January 2, did not specifically express any urgency or emergency for ophthalmology follow-up. (Trans. 746-47; GEC App. 20.) Dr. Sorensen's letter was the first communication GEC received about Camen and his headaches or visual changes. (Trans. 939; GEC App. 34.) Dr. Sorensen has called Dr. Stein on occasion to report urgent cases, but he did not ever telephone Dr. Stein or GEC about Camen. (*Id.*)

Dr. Stein's care of Camen – January 5-12, 2018

Camen's mother scheduled a January 5, 2018, appointment for Camen with Dr. Stein. Neither Dr. Stein nor anyone else at GEC was involved in Camen's care from Thanksgiving 2017 until six weeks later, when Dr. Stein first evaluated Camen at 1:00 p.m. on Friday, January 5, 2018. (Trans. 935; GEC App. 33.)

Dr. Stein evaluated Camen three times over the next eight days, between January 5 and January 12. (Trans. 937; GEC App. 34.) Dr. Stein examined Camen's eyes and his visual acuities and increased his Diamox at each of those visits. (Trans. 937-38; GEC App. 34.)

At the time of Camen's initial GEC appointment, Camen had intracranial hypertension (elevated CSF pressure in his head). The question for Dr. Stein was whether Camen's condition was "idiopathic," meaning of unknown cause. (Trans. 823; GEC App. 27.) The other potential causes of Camen's intracranial hypertension and papilledema included an infiltrative process (cancer, most likely leukemia) or venous sinus thrombosis (meaning a venous blood clot). (Trans. 955; GEC App. 38.) Dr. Stein understood that idiopathic intracranial hypertension, "IIH", could be the cause of Camen's presentation but he did not have enough information to make that diagnosis on January 5. (*Id*.) Idiopathic IH versus IH caused by other conditions such as leukemia or clot warrant different treatments, which is why those other conditions must be ruled out before shunt placement. (Trans. 935-36; GEC App. 33.)

On January 5, Dr. Stein had Dr. Sorensen's letter but not the report of the CT scan or any other imaging studies. (Trans. 945-46; GEC App. 36.) Dr. Stein tried but was unable to reach Dr. Wheeler on January 5. After seeing other patients, Dr. Stein searched for more information about Camen and his condition. Dr. Stein located some information he needed, including a report of an MRI performed in Kalispell, through his electronic access to the radiology communication system. (Trans. 961; GEC App. 40.) Dr. Stein did not have access to Dr. Wheeler's, PA Bauer's or Dr. Sorensen's records. (Trans. 859, 945-47; GEC App. 31, 36.)

Dr. Stein saw Camen again on Tuesday, January 9, and again found significant retinal hemorrhages. (Trans. 967-71; GEC App. 41.) Dr. Stein still needed to rule out cancer as the cause of Camen's intracranial pressure. On January 9, Dr. Stein ordered a repeat lumbar puncture with a specific request that the pathologist search for cells to rule out cancer. (Trans. 977-78, 981-83; GEC App. 44-45.)[2] This lumbar puncture was therapeutic in that it temporarily lowered the intracranial CSF pressure by removing CSF. (Trans. 524-25, 976-79; GEC App. 9-10, 43-44.) It was also diagnostic in that it allowed providers to determine if increased Diamox was lowering the pressure and allowed providers to examine the fluid to search for cancer cells. (*Id.*) Dr. Stein simultaneously increased Camen's dose of Diamox to the maximum tolerated dose. (Trans. 972-73; GEC App. 42.) Dr. Stein also offered to refer Camen and his mother to specialists in Salt Lake City and/or Seattle. (Trans. 938; GEC App. 34.)

Dr. Stein discussed Camen's situation with Dr. Wheeler by telephone on January 9. (Trans. 972; GEC App. 42.) Dr. Wheeler explained that a neuroradiologist had concluded, based on an MRI, that no venous clot was present and that an MRV was not needed (Trans. 972-73; GEC App. 42-43.) Dr. Wheeler also explained that earlier testing ordered by PA Bauer did not appear to demonstrate malignant cells

[2] It is undisputed that placing a shunt to treat intracranial hypertension caused by leukemia would not be appropriate. (Lee Perpetuation Depo. 110.) Dr. Stein had previously seen leukemia present like this and needed to rule out leukemia with another lumbar puncture and cell cytology. (Trans. 788-94.)

but agreed repeating the lumbar puncture was appropriate. (*Id*.; Trans. 1003; GEC App. 42-43, 50.) The lumbar puncture ordered on January 9 was completed on Wednesday, January 10, and Dr. Stein received the cytology results on Thursday, January 11. (Trans. 981-83; GEC App. 45.) That lumbar puncture ruled out cancer. (Trans. 984; GEC App. 45.)

Dr. Stein saw Camen the next day, Friday January 12, in his office. (*Id*.) That was exactly one week after Dr. Stein's initial visit with Camen. Despite taking a high dose of Diamox, Camen's vision was worse. (Trans. 985; GEC App. 46.) IIH was Dr. Stein's confirmed diagnosis on January 12 because other causes were ruled out as of that date. (Trans. 998; GEC App. 49.) Dr. Stein determined that medical options were exhausted and Camen needed to see a neurosurgeon. (Trans. 985-86; GEC App. 46.) Dr. Stein spoke with the neurosurgeon, Dr. Kelly Schmidt, while Camen was in his office on January 12 and recommended that Camen and his mother speak to Dr. Schmidt immediately. (Trans. 986; GEC App. 46.)

Brain shunt

Dr. Schmidt spoke to Camen and his mother on Friday, January 12, and offered immediate hospital admission. (Trans. 986-87; GEC App. 46.) Camen and his mother declined and opted to go to the hospital on Sunday, January 14, before the Monday, January 15 brain shunt surgery. (Trans. 986-87, 1447; GEC App. 46,

64.) Dr. Schmidt completed the shunt surgery on January 15. (Trans. 1447; GEC App. 64.)

Camen's vision initially improved in both eyes following the shunt placement. (Trans. 999-1000, 1448-49; GEC App. 49, 65.) However, Camen's vision subsequently – and somewhat abruptly – deteriorated. (Trans. 999-1000; GEC App. 49.) About six weeks after the surgery, Dr. Schmidt noted that Camen's vision was not recovering well despite improvement in the appearance of the optic nerve. (*Id.*) In the month after the surgery, Dr. Schmidt and other physicians raised the possibility that Camen had developed a clot in his brain vein system, and that the clot caused the increased intracranial pressure. (Trans. 993-96, 1000-1002; GEC App. 48, 49-50.)

Trial testimony by medical experts

Camen presented three medical experts at trial.

Dr. Andrew Lee is a neuro-ophthalmologist. (Lee Perpetuation Depo. 5; GEC App. 100.) Dr. Lee opined that Camen probably had IIH as of November 23, 2017. (*Id.* 83; GEC App. 109.) Dr. Lee distinguished between "IIH" and "fulminant IIH," defining "fulminant IIH" as "fast and bad" vision loss. (*Id*. 26-27; GEC App. 103.) He contended that fulminant IIH requires immediate surgery. (*Id.* at 9; GEC App. 101.) Dr. Lee claimed both doctors violated the standard of care. Dr. Lee claimed Dr. Stein violated the standard of care by his treatment of Camen between January

5-12, which Dr. Lee viewed as appropriate for IIH but not "fulminant IIH". (*Id.* 52-58; GEC App. 104-06.)

Dr. Lee is not a pediatric ophthalmologist and has no specialty training in pediatrics. (*Id.* 114-15; GEC App. 114.) On cross-examination, he conceded that to reach the diagnosis of "fulminant IIH" a physician must rule out other potential causes of a patient's elevated intracranial pressure. (*Id.* 108-09, 133; GEC App. 112, 115.) Dr. Lee agreed that cancer may be a cause of elevated intracranial pressure and that flame hemorrhages, as seen in Camen, are found in patients with leukemia. (*Id.* 110-11; GEC App. 113.) Dr. Lee also conceded that peripheral retinal hemorrhages, like Camen had, are "very uncommon" in any type of IIH but can be consistent with leukemia. (*Id.* 120-21; GEC App. 115.) Dr. Lee agreed that Camen is outside the typical demographic for an IIH patient, as IIH patients are almost always overweight females of child-bearing age. (*Id.* 111; GEC App. 113.)

Dr. Lee conceded that, before a decision may be made to proceed with permanent shunt placement, other possible causes of intracranial hypertension must be ruled out. (*Id.* 133; GEC App. 116.) He testified that Camen had fulminant IIH by December 17, maybe earlier, and that fulminant IIH will cause permanent, irreversible vision damage within a few days or, at most, less than two weeks. (*Id.* 97; GEC App. 111.) Dr. Lee also acknowledged that the risks of brain shunt surgery include death, stroke, infection, cerebral spinal fluid leaking, abdominal pain, and

bowel perforation. (*Id.* 69-71; GEC App. 107-08.) Dr. Lee acknowledged that brain shunt surgery carries a 48% to 68% chance of shunt failure. (*Id.* 73; GEC App. 108.)

Dr. Lee conceded that the disease IIH was a substantial factor in causing Camen's vision loss and that there existed the very real potential that Camen would have been blind regardless of earlier surgery. (*Id.* 93-95; GEC App. 110-11.) Dr. Lee could not state with certainty the outcome if a shunt had been placed earlier. (*Id.* 113; GEC App. 113.)

Dr. Todd Lefkowitz, a Phoenix ophthalmologist, characterized Camen's condition as emergent and requiring immediate shunt placement or optic nerve sheath fenestration, where the nerve sheath surrounding the optic nerve is opened to relieve pressure.[3] (Lefkowitz Perpetuation Depo. 21; GEC App. 119.) Dr. Lefkowitz contended that Dr. Stein violated the standard of care on January 5 and January 9 in that he did not then locate a neurosurgeon who could perform the required surgery. (*Id.* 33-38; GEC App. 121-22.) Dr. Lefkowitz also erroneously assumed Dr. Stein did not speak to any doctor or healthcare provider for seven days after the January 5 office visit. (*Id.* 31; GEC App. 120.) On the erroneous assumption that Dr. Stein waited until January 14 to refer Camen to a neurosurgeon, Dr. Lefkowitz also claimed that Dr. Stein violated the standard of care by that alleged delay, even

[3] There was no provider in Montana in 2017/2018 who could perform this procedure.

though Dr. Stein undisputedly put Camen and his mother in direct contact with Dr. Schmidt via phone on January 12. (*Id.* 40-41; GEC App. 122-23.)

Cross-examination revealed that Dr. Lefkowitz, a general ophthalmologist, did not know Dr. Stein is a pediatric ophthalmologist. (*Id*. 64; GEC App. 127.) Dr. Lefkowitz did not know that Dr. Stein contacted the neurosurgeon Dr. Schmidt on January 12 (*Id.* 68; GEC App. 128.) Dr. Lefkowitz was similarly unaware Camen and his mother declined admission to the hospital on January 12 (*Id.* 46; GEC App. 124.) Agreeing that 97% of IIH patients are women, Dr. Lefkowitz acknowledged that only about 38% of surgeries are successful. (*Id*. 56; GEC App. 125.)

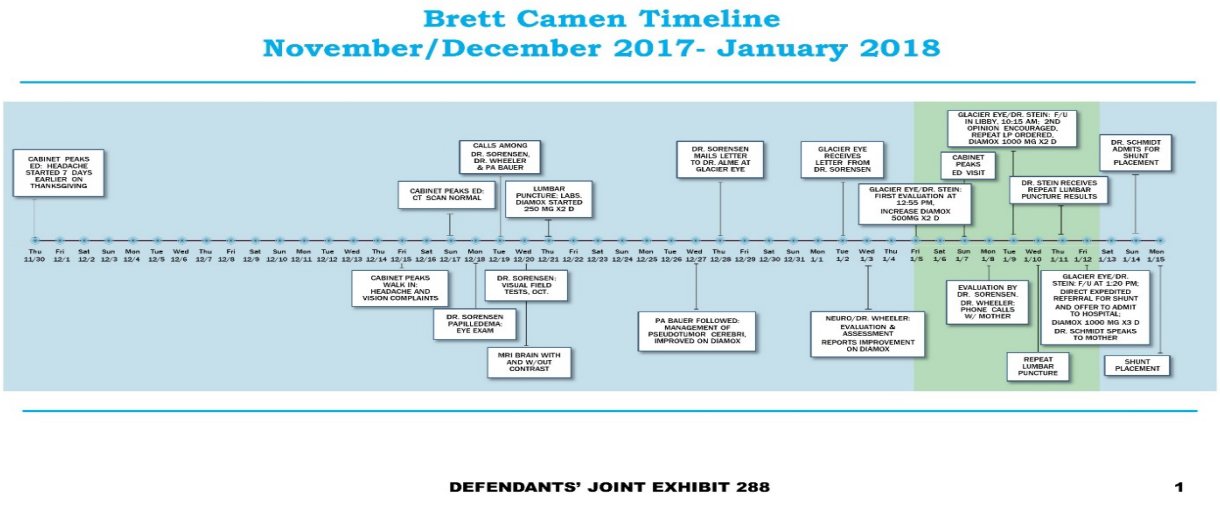
Dr. Lefkowitz conceded Camen sustained permanent, irreversible vision loss weeks before he first saw Dr. Stein for care. (*Id.* 58-59; GEC App. 126.) Dr. Lefkowitz testified that Camen had fulminant IIH by December 18 or 19 (*Id*. 58; GEC App. 126) and that Camen's permanent, irreversible vision damage started around Thanksgiving 2017. (*Id*. 58-59; GEC App. 126.) Dr. Lefkowitz offered that "very little" function of Camen's optic nerve remained by the time Camen first saw Dr. Stein. (*Id*. 89; GEC App. 130.)

Dr. Steven Glass, a pediatric neurologist, criticized aspects of Dr. Wheeler's care. On cross-examination, Dr. Glass admitted he has never had a patient with fulminant IIH and has never cared for one. (Glass Perpetuation Depo. 67; GEC App. 133.) Dr. Glass noted in his review of the medical records that Diamox helped

Camen's headaches and visual function significantly in December of 2017. (*Id.* 76; GEC App. 135.) Dr. Glass also agreed fulminant IIH can develop as soon as 24 to 48 hours after the onset of symptoms. (*Id.*)

Dr. Stein and Dr. Wheeler also testified, respectively, to their care and treatment, their compliance with their respective standards of care, and their bases for reaching their respective opinions.

Dr. Stein, a board-certified ophthalmologist with specialty training in pediatric ophthalmology (Trans. 780; GEC App. 21), used the timeline admitted as **Exhibit 288**[4] **(GEC App. 91)** to explain his involvement in Camen's care and treatment beginning on January 5, 2018 [green denotes days of Dr. Stein involvement].



[4] The parties stipulated to the admission of this Exhibit. (Dkt. 136 p 1, Dkt. 135, p 2; GEC App. 262, 260.)

Dr. Stein confirmed the accuracy of the timeline concerning his involvement and that his care and treatment of Camen was reasonable and appropriate and within the applicable standard of care. (Trans. 989, 1006-1007; GEC App. 47, 51.)

The standard of care required Dr. Stein to rule out other causes of Camen's intracranial hypertension before he could presume it was idiopathic and treat it as such. (Trans. 826, 962, 996; GEC App. 28, 40, 48.) Dr. Stein, like Camen's experts Dr. Lee and Dr. Lefkowitz, explained that the diagnosis of IIH requires ruling out leukemia before a shunt is appropriate. (Trans. 936; GEC App. 33.) Leukemia is ruled out by blood test and examination of the cells and the cerebral spinal fluid. (Trans. 957; GEC App. 39.) Determining whether the increased pressure emanates from an identifiable cause is the first and most crucial step. (*Id.*)

Dr. Stein defined fulminant IIH as rapidly progressive vision loss, usually over a period of days, and four weeks or less from the onset of symptoms. (Trans. 811-12; GEC App. 25.) For Camen, the onset of first symptoms was Thanksgiving. (Trans. 1008; GEC App. 51.) Dr. Stein explained his attribution of the onset of the symptoms to Thanksgiving rather than to December 15, as testified by Dr. Lee. (Trans. 906-07; GEC App. 32.)

Dr. Stein's examination of Camen's eyes identified peripheral retinal hemorrhages, which are not common in patients with IIH. (Trans. 949; GEC App. 37.) The finding would be visible only on dilation of the eye, a test neurologists and

primary care providers do not perform. (Trans. 950; GEC App. 37.) The finding of peripheral retinal hemorrhages was a red flag for potential leukemia, along with the presentation of a young male with increased intracranial pressure. (Trans. 958, 950; GEC App. 39, 37.) Usually, an IIH patient is a female of a child-bearing age; when IIH occurs in males, typically they are older. (Trans. 954; GEC App. 38.) Camen's presentation was very uncommon for IIH. (Trans. 953-54, 958; GEC App. 38-39.)

At the January 5 visit, Dr. Stein spoke with Camen and his mother to discuss Camen's history. (Trans. 944-45; GEC App. 35-36.) Camen reported that Diamox had improved his headaches, indicating that the Diamox was initially somewhat effective. (Trans. 947; GEC App. 36.) Camen was tolerating the Diamox well. (Trans. 855; 958-59; GEC App. 30, 39.) Dr. Stein increased the dose of Diamox and changed the dose to sequels to provide more consistent daily dosing. (Trans. 958-59; GEC App. 39.) The evening of January 5, having only the field studies from Dr. Sorensen (Trans. 946; GEC App. 36), Dr. Stein searched through GEC's electronic access to radiology records, where he found some, but not all, of Camen's imaging reports and studies. (Trans. 961; GEC App. 40.) The report from the MRI did not disclose whether Camen had a clot in the venous system. (Trans. 962; GEC App. 40.) The lumbar puncture report Dr. Stein located provided some information, but the cell count indicated that red blood cells had clouded the fluid and contaminated it. (Trans. 962-63; GEC App. 40.)

Connecting by telephone with Dr. Wheeler on January 9, Dr. Stein learned that a neuroradiologist had opined, based on the MRI, that no clot existed in the veins in Camen's brain. (Trans. 972-73; GEC App. 42-43.) Dr. Stein received the results of the second, uncontaminated lumbar puncture on Thursday, January 11, which ruled out cancer. (Trans. 983-84.)

The next day, Friday, January 12, Dr. Stein learned that, despite the lumbar puncture and large doses of Diamox, Camen's vision became significantly worse. (Trans. 985; GEC App. 46.) Camen's condition on that date and the additional information Dr. Stein had received led Dr. Stein to diagnose fulminant IIH. (Trans. 832; GEC App. 29.) Dr. Stein immediately connected Camen and his mother with neurosurgeon Kelly Schmidt. (*Id.*)

Jury instruction conference and instruction of jury

Camen's counsel tendered pattern instructions concerning the weight to be given expert testimony, MPI 2d 1.12, and the pattern instruction defining the duty of a board-certified doctor, MPI 2d 3.01. (Trans. 1636-37; GEC App. 67.) Defense counsel offered no objection, and the court agreed the instructions would be given. (*Id.*) Camen tendered his instruction No. 9, a general negligence proportionate duty instruction which would tell the jury that the care of the defendant "varies with the danger involved in his acts, and is proportionate to it" and that "[t]he greater the danger, the greater the care which must be exercised." (Trans. 1637; Dkt. 137 p 14;

GEC App. 67, 153.) Camen did not raise a proportionate duty claim in the Pretrial Order. (Dkt. 62 pp 2-4; GEC App. 276-78.) Reasoning that Montana law requires the standard of care to be defined by medical experts rather than the speculation of the jurors and noting the prior appellate case law permitting the instruction in common law negligence cases, not cases involving claims of medical malpractice, the district court refused the instruction. (Trans. 1637-40; GEC App. 67.)

On causation, gave Camen's proposed instruction No. 10, the general causation instruction set forth in MPI 2d 2.08, telling the jury that "a defendant's conduct is a cause of the plaintiff's injury if it is a substantial factor in bringing it about." (Trans. 1664-68; GEC App. 73-74.) Camen proposed another causation instruction advising the jury on a theory of lost chance. (Trans. 1641; GEC App. 68.) Objecting to the instruction, defense counsel explained Camen failed to comply with § 27-1-739 MCA. (Trans. 1641-55; GEC App. 68-71.) Camen never offered an instruction consistent with the requirements of §27-1-739, MCA. The district declined Camen's proposed instruction No. 11 and also found that the testimony of Camen's experts did not support the language of proposed instruction No. 11. (Trans. 1655-56; GEC App. 71-72.)

The district court and the parties' counsel reviewed a special verdict form and jointly revised the form. (Trans. 1711-21; GEC App. 76-79.) All agreed to the ultimate version of the special verdict form. (Trans. 1721; GEC App. 79.)

Verdict for Dr. Stein and Dr. Wheeler

The jurors reached a verdict for both KRMC and GEC on February 9, 2022. (Dkt. 140.1; GEC App. 294-96.) The jurors never reached the question of causation. (*Id*.)

STANDARDS OF REVIEW

This Court "reviews jury instructions given by a district court for abuse of discretion. [This Court] review[s] jury instructions to determine whether, as a whole, the instructions fully and fairly instruct the jury as to the applicable law." *Montana v. Deveraux*, 2022 MT 130, ¶ 20, 409 Mont. 177, 512 P.3d 1198. This Court considers "the jury instruction in its entirety, as well as in connection with the other instructions given and with the evidence introduced at trial." *Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, ¶ 43, 351 Mont. 464, 215 P.3d 649. "In determining how to instruct the jury, the district court should take into consideration both the parties' theories and the evidence presented at trial." *Id.* ¶ 46.

"To preserve an issue for appeal, a party must object when the grounds for the objection become apparent." *Evans v. Scanson*, 2017 MT 157, ¶ 79, 388 Mont. 69, 396 P.3d 1284. "It is well established that this Court will not review an issue that was not raised in the district court." *Paulson v. Flathead Conservation Dist.*, 2004 MT 136, ¶ 37, 321 Mont. 364, 91 P.3d 569.

"This Court's standard of review of rulings on the admissibility of evidence, including oral testimony, is whether the district court abused its discretion." *Jacobsen* ¶ 26. "The district court has broad discretion in determining the admissibility of evidence." *Puccinelli v. Puccinelli*, 2012 MT 46, ¶ 12, 364 Mont. 235, 272 P.3d 117. An abuse of discretion "occurs if the court acts arbitrarily without employment of conscientious judgment, or if it exceeds the bounds of reason and substantial injustice results." *Evans* ¶ 10.

"[I]t is well established that no civil case shall be reversed by reason of error which would have no significant impact upon the result; if there is no showing of substantial injustice, the error is harmless." *Newbauer v. Hinebauch*, 1998 MT 115, ¶ 20, 288 Mont. 482, 958 P.2d 705.

SUMMARY OF ARGUMENT

No prejudicial error occurred in the trial. The district court correctly instructed the jury on the issue of duty, which in medical malpractice cases is framed by expert testimony and determined by the jury based on the duties and risks identified by the medical expert witnesses; Camen is wrong in contending that a medical provider's duty is determined solely on the amount of danger involved. Similarly, Camen fails to establish reversible error based on the refusal of a general negligence, pattern loss of chance causation instruction, where the jury did not reach the causation question. Moreover, the instruction was not supported by the facts or case law.

Camen similarly failed to establish that the district court abused its discretion with respect to the testimony of Dr. Wheeler. The district court appropriately overruled Camen's objection to an isolated statement that supported Dr. Wheeler's defense of his own treatment and did not impact the defense of Dr. Stein. Regardless, Dr. Wheeler properly testified pursuant to his disclosure as a hybrid witness.

The district court also abided by § 25-7-501, MCA, governing the method of polling the jury and this Court's interpretation of the Legislature's purpose of polling: to confirm that the required votes supported the jury's verdict. Camen's belated objection to polling finds no support in the record for any concern of impropriety.

ARGUMENT

I. The Trial Court Properly Instructed the Jury Regarding Duty and Causation.

The trial court fully and fairly instructed the jury with Camen's proposed instructions on duty and causation. (Trans. 1776-79; GEC App. 83.) His proposed instructions regarding proportionate duty and loss of chance misstate the law and do not apply to the facts of this case.

"[T]he only purpose which is properly served by instructions to the jury is to assure a decision consistent with the evidence and the law. This can only be accomplished when the instructions are as plain, clear, concise, and brief as

possible." *Busta v. Columbus Hosp. Corp.*, 276 Mont. 342, 373, 916 P.2d 122, 140 (1996). This Court has long held that "while a party is entitled to have instructions on his theory of the case, he is not entitled to an instruction concerning every nuance of his argument." *State v. Lantis*, 1998 MT 172, ¶ 48, 289 Mont. 480, 962 P.2d 1169. The party claiming instructional error "must show prejudice, which will not be found if the jury instructions in their entirety state the applicable law of the case." *Murphy Homes, Inc. v. Muller*, 2007 MT 140, ¶ 74, 337 Mont. 411, 162 P.3d 106. This Court will not reverse a district court based on refusal of a jury instruction unless the "omission affected the substantial right of the complaining party." *Busta*, 276 Mont. at 373, 916 P.2d at 140-41. Here, the district court correctly instructed the jury, which returned a defense verdict overwhelmingly supported by the evidence.

A. The trial court properly refused Camen's proposed proportionate duty instruction as inapplicable to medical malpractice cases.

Camen tendered the following duty instruction:

> The care required of a defendant in a negligence claim is always reasonable care. This standard never varies but the care which it is reasonable to require of the defendant varies with the danger involved in his acts, and is proportionate to it. The greater the danger, the greater the care which must be exercised.

(GEC App. 151.) The proportionate duty instruction does not accurately state Montana law applicable to medical malpractice cases. (Trans. 1637-40; GEC App. 67-68.)

The district court instructed the jury as follows:

> There must be expert testimony to establish negligence in a medical malpractice action. Specifically, Plaintiff must present qualified expert medical testimony establishing the following elements: 1) the standard of care applicable to each defendant physician; 2) a departure from the applicable standard of care by each defendant physician; and 3) that the departure from the standard of care caused injury to Plaintiff.[5]

(Trans. 1777; GEC App. 83.)

The district court further instructed the jury using Montana Pattern Instructions 3.01 and 3.07, which are specifically intended for medical malpractice cases.

> It is the duty of a board certified doctor to use that skill in learning ordinarily used in like cases by other doctors in good standing practicing in that same specialty and who hold the same national board certification.
>
> The violation of this duty is negligence.
>
> In determining whether the doctor was negligent in performing professional services the proper test is whether the doctor's performance met the accepted standards of skill and care at the time the services were provided.

(Trans. 1777; Instruction Nos. 21-22; GEC App. 83, 239-40.)

Camen's proportionate duty instruction has no place in a medical malpractice case because weighing the risks of various actions is inherent in a physician's

[5] This Court has approved this instruction in medical malpractice cases. See *Montana Deaconess Hospital v. Gratton*, 169 Mont. 185, 188-89, 545 P.2d 670, 672 (1976); *Estate of Willson v. Addison*, 2011 MT 179, ¶ 17, 361 Mont. 269, 258 P.3d 410.

exercise of medical judgment. Medical malpractice plaintiffs are required to present expert testimony, which frames the basis for a jury to determine whether a physician fulfilled his duty by complying with the standard of care under the specific circumstances of the case. *See Beehler v. Eastern Radiological Associates, P.C.*, 2012 MT 260, ¶ 18, 367 Mont. 21, 289 P.3d 131.

Camen's suggested instruction creates a heightened duty of care for medical malpractice defendants. The standard of care must be defined by expert testimony. *See Sulton v. HealthSouth Corp.*, 734 S.E.2d 641 (S.C. 2012) (holding the proportionate duty instruction "improperly instructed the jury that they owed a heightened duty of care" in medical malpractice case against hospital and nurses). In a medical malpractice case, Camen's proposed instruction would usurp the function of medical experts and place the role of defining duty with the court and jury. The court would instruct the jury that a doctor must exercise care greater than normal reasonable care when a medical situation presents a high risk. A judicial assessment that potential outcomes require a higher duty of care would supplant expert testimony defining reasonable care. A jury no longer would function as fact finder concerning what conduct meets the standard of care defined by qualified experts. Here, the trial court correctly noted that "medical negligence is a special subspecies, so to speak, of negligence, and the standard of care is established appropriately by expert testimony." (Trans. 1640; GEC App. 68.)

The refusal of Camen's Proposed Instruction No. 9 did not undermine Camen's "theory of the case" or prevent him from arguing, through his experts, that Dr. Stein and Dr. Wheeler were obligated to proceed with more caution given the risk of vision loss. Indeed, that is exactly what Camen argued. Camen's experts testified that Defendants owed a heightened duty of care given the significance of the risk. Dr. Lefkowitz stated, "… [F]ulminant cases don't warrant watchful waiting ... because, again, the tissue will be dying as we speak so the whole aim is to get that pressure down ASAP, … before any further irreversible tissue loss is experienced." (Lefkowitz Perpetuation Depo. 23; GEC App. 119.) Similarly, Dr. Glass testified "that increased intracranial pressure and the specific risks that come with intracranial hypertension and visual failure … requires prompt and assiduous care but also requires a simultaneous process of working a patient up and treating them right at the same time to minimize the feared complication." (Glass Perpetuation Depo. 103; GEC App. 136.) Dr. Lee also argued Camen's theory of duty by noting one cannot watch and wait with "fulminant" IIH because blindness is at stake. (Lee Perpetuation Depo. 18-19; GEC App. 102.)

The defense experts identified other considerations, relevant to duty – the importance of ruling out cancer or other potential causes of intracranial pressure so that the patient does not unnecessarily undergo shunt surgery and all its potential complications. (Trans. 826, 962, 996, 1325-30; GEC App. 28, 40, 48, 60-61.) Even

Camen's experts agreed that the physicians first must rule out possible causes. (Lee 133; Lefkowitz 30; GEC App. 116, 120.)

After hearing Camen's experts explain that the risks of intracranial hypertension define the duty of care and Defendants' rebuttal, the jury concluded that both Defendants met their duty of care despite the risk of permanent vision loss. This Court should not disturb the jury's reasonable conclusion.

1. The district court correctly applied Montana law in refusing Camen's proportionate duty instruction.

Camen cites an inapposite negligence case concerning the safeguarding of firearms, *Estate of Strever v. Cline*, in urging this Court to overturn the trial court's ruling on the duty instruction. 278 Mont. 165, 924 P.2d 666 (1996); (Camen's brief at 21.) However, this Court has never applied the proportionate duty instruction to a medical malpractice case.

In *Strever*, the plaintiff sued three companions of the minor decedent and the owner of a pistol after the decedent was accidentally shot. 275 Mont. at 168-69, 924 P.2d at 671. This Court recognized that the gun owner owed a duty to store a pistol in a safe and reasonable manner. The recognition of the duty owed in the context of a dangerous instrumentality and Camen's citation to the Restatement provides no guidance here. Montana law mandates that the issue of what constitutes reasonable conduct by a doctor is established through the testimony of medical expert witnesses.

Camen extensively cites another inapposite case, *Schuff v. Jackson*, in urging an overhaul of Montana law on the subject of duty in a medical malpractice case. 2002 MT 215, 311 Mont. 312, 55 P.3d 387 (cited in Camen's brief at 19, 22, 28, 34.) In *Schuff*, the plaintiffs sued a boat owner after sustaining injuries in a boating accident. *Id*. The defendant miscalculated the location of a rock formation and collided with it. *Id*. ¶¶ 6-9. This Court determined that the district court should have instructed the jury on the defendant's higher duty of care in light of his knowledge of the rock formation and the defendant's statutory duty of care as operator of the boat. *Id*. ¶¶ 37-39. In *Schuff*, this Court held that the defendant's "knowledge of the rock formation's existence and its potential danger increased the duty of care." *Id*. ¶ 37.

By contrast, in medical malpractice cases, Montana law and the corresponding pattern jury instructions reflect the understanding that medical care providers have knowledge beyond the ken of laypersons. For that reason, expert testimony is required to establish the standard of care. Here, in contrast to *Schuff*, experts testified regarding the standard of care, including the obligations necessitated by the potential risk to Camen. The corresponding instructions fully instructed the jury to assess the expert testimony and determine Dr. Stein's and Dr. Wheeler's compliance with the standard of care.

Camen also errs in emphasizing this Court's foreseeability analysis in *Fisher v. Swift Transportation Co., Inc.*, 208 MT 105, ¶ 21, 342 Mont. 335, 181 P.3d 601. (Camen's brief at 22.) Citing *Fisher*, Camen raises the concept of foreseeability as an aspect of legal duty. (Camen's brief at 22.) But the public policy considerations applicable to the issue of duty have no bearing on this case, where Defendants do not dispute the existence of a legal duty.

Other jurisdictions have long made clear that the proportionate duty instruction does not apply to medical malpractice. *See Hinkle v. Cleveland Clinic Found.*, 823 N.E.2d 945, 960 (Ohio Ct. App. 2004) (holding "it was not error for the trial court not to include an instruction on "greater danger" in medical malpractice case); *Pittman v. Stevens*, 613 S.E.2d 378, 381 (S.C. 2005) (rejecting proportionate duty instruction as "inappropriate in a medical malpractice case"); *Utley v. Burns*, 70 Ill. 162, 164-65, (Ill. 1873) (rejecting instruction requiring surgeon "to exercise care and skill proportionate to the character of the injury he treats").

Camen claims the proportionate duty instruction should have been given because other Montana district courts have given this instruction.[6] But the rulings of district court judges are of no precedential value. *See Bordas v. Virginia City Ranches Ass'n*, 2004 MT 342, ¶ 20, 324 Mont. 263, 102 P.3d 1219. Moreover,

[6] Camen argues "counsel provided the trial court with examples of the instruction given by other trial courts in medical malpractice claims." (Brief at 26.) In fact, Plaintiff gave one example of a trial court giving the proposed instruction in a medical malpractice case. (Dkt.137; GEC App. 150.) In *Fardeen v. Glacier ENT*, the court gave the instruction over defense counsel's objection.

Camen's proposed instruction would incorrectly instruct a jury in a medical malpractice case that a defendant physician "must" exercise "greater care" where the danger is "greater." This instruction directly contradicts this Court's long-standing precedent that, in a medical negligence case, the applicable duty (whether or not higher in light of the risk) is established by expert testimony, and the court does not tell the jury that one aspect of the consideration "must" control over others. *See Estate of Willson v. Addison*, 2011 MT 179, ¶ 17, 361 Mont. 269, 258 P.3d 410.

Finally, allowing Camen's duty instruction in medical malpractice cases will, by default, impose a heightened or "greater" duty in many situations encountered by medical providers practicing in Montana. Camen's instruction requires "greater" care in any situation where the danger is "great." While such an assessment may be straight forward, obvious, and familiar to the lay person in common Montana activities such as operating boats at high speed or safely storing firearms, the assessment is not straight forward and obvious in medicine. That is why expert testimony is required to explain and establish the standard of care in medical malpractice suits. Doctors are constantly faced with conditions and decisions that implicate significant consequences. Unlike people driving boats or handling firearms, physicians cannot make the choice to avoid dangerous situations or conditions; the gravity of the situation is the exact reason we seek their care. Adopting a greater danger greater care standard for medical providers in Montana

will impose a form of strict liability in any medical situation where the risks are high. Worse yet, it may limit the number of providers willing to care for Montanans faced with medical conditions or treatments with potentially "dangerous" consequences.

2. Refusal of Camen's proposed proportionate duty instruction did not prejudice him.

Any claim of error regarding Camen's proportionate duty instruction was harmless. The district court's refusal of Camen's proportionate duty instruction did not affect the outcome of the case and thus did not meet the standard for establishing prejudicial error. *See Steffensmier v. Huebner*, 2018 MT 173, ¶ 7, ¶¶ 10-12, 392 Mont. 80, 422 P.3d 95. Camen presented three medical experts whose duplicative testimony made Camen's theory abundantly clear. All three claimed that Camen's condition required emergency surgery given the potential for any delay to cause permanent blindness. In closing argument, Camen's counsel urged the jury to accept Dr. Lee's testimony as the leading expert in the country regarding the care required under the circumstances and to reach the conclusion that the Defendants did not meet the standard of care by delaying treatment that, counsel argued, would have prevented Camen's blindness.

Montana law does not require an instruction reiterating the nuances of Plaintiff's experts' testimony in the instructions. The instructions sufficiently set forth Montana law on the duty of a physician in a medical negligence case. *See Anderson v. Harper*, 2014 MT 369, ¶¶ 8-9, 373 Mont. 127, 314 P.3d 908.

B. The trial court properly refused Camen's loss of chance jury instruction, which had no impact on the jury's verdict.

Camen claims reversible error in the trial court's refusal of an instruction stating that a "doctor's negligence is a cause of damage to the plaintiff if it increases risk of harm to the plaintiff or reduces the plaintiff's chance for obtaining a better result." (Dkt. 137; GEC App. 154.) The jury, however, did not reach the issue of causation. In a special verdict form to which Camen's counsel acquiesced, the jury was instructed to answer questions in the order presented and was directed not to answer questions concerning causation only if the jury found no negligence. The district court correctly refused the lost chance instruction. Even if the causation issue were relevant, Camen's argument regarding the lost chance instruction still fails, based on waiver and based on the merits of the argument.

1. This Court's decision in *Steffensmier* demonstrates that the claimed instructional error pertaining to causation did not affect Camen's substantial rights.

In *Steffensmier*, this Court recognized its pledge to "exercise the greatest self-restraint in interfering with the constitutionally mandated process of jury decision." *Steffensmier*, ¶ 7, ¶¶ 10-12. This Court declined to address whether an alleged instructional error on the same issue Camen urges is reversible error – refusal of a proposed loss of chance instruction – because the jury resolved the question of negligence in favor of the defendant. The plaintiffs in *Steffensmier* argued that the district court misapplied the law in rejecting a proposed loss of chance instruction in

a medical malpractice action against a physician. *Id*. ¶ 10. This Court did not reach the merits of the argument. It explained that "[i]n light of the jury's findings that Dr. Huebner was not negligent, the District Court's instructional error, if any, did not affect Plaintiffs' substantial rights and was harmless." *Id*. ¶ 12. The same exact analysis defeats Camen's contention here.

Camen's efforts to distinguish *Steffensmier* based on lawyers' traditional definition or understanding that "negligence" includes causation fails because the stipulated jury instructions and verdict form given to this jury consistently defined "negligence" to encompass a breach of the duty and not causation. The instructions did not conflate the concepts of duty and causation as Camen argues. Instructions 17, 21, 22, 24, and 26 demonstrate that, in addition to the special verdict form, the jury was given instructions clearly delineating and distinguishing negligence and causation as separate elements of Camen's claim.

2. Even if causation were relevant, Camen waived any objection to the instructions' delineation of negligence and causation.

The record does not support Camen's speculation "that the jury, as instructed, considered the issue of causation in determining whether each doctor was negligent for the purposes of the special verdict form." (Camen's brief at 32.) Camen refers to the expert testimony instruction, directing the jury that Camen must present qualified expert medical testimony establishing the standard of care applicable to each Defendant physician, a departure from the applicable standard of care, and that the

deviation from the standard of care "caused injury to the plaintiff." (Trans. 1777; GEC App. 83). Camen appears to suggest, based on this instruction, that the special verdict form had the jurors assess causation as part of question No. 1 regarding negligence. Camen is wrong. Regardless, Camen never objected to the expert testimony instruction; to the contrary, he proposed it. (Trans. 1699; GEC App. 75). Camen also never objected to the special verdict form. (Trans. 1712; GEC App. 77). Finally, Camen never objected in closing argument when counsel explained that, if the jury finds no "negligence", they need not consider causation or damages. (Trans. 1848, 1889-90; GEC App. 84-85.)

The "failure to object to verdict form and/or jury instructions at trial is a waiver of the right to challenge them on appeal." *Turk v. Turk*, 2008 MT 45, ¶ 16, 341 Mont. 386, 177 P.3d 1013. Camen waived any argument, based in whole or part, on the verdict form or Instruction No. 20.

3. Even if causation were relevant and Camen had not waived his objections, Camen's proposed loss of chance instruction is not applicable to medical malpractice cases.

On the merits, the trial court properly refused Camen's loss chance instruction. Camen's instruction does not apply to medical malpractice cases. Montana has a specific statute that sets out detailed requirements for loss of chance in medical malpractice cases, requirements Camen failed to meet. § 27-1-739, MCA. Moreover, Camen never requested an instruction consistent with § 27-1-739, MCA.

The trial court correctly instructed the jury on causation. Camen's proposed instruction No. 10, the causation instruction set forth in MPI 2d 2.08, was given, and told the jury that "a defendant's conduct is a cause of the plaintiff's injury if it is a substantial factor in bringing it about." (Trans. 1664; GEC App. 73.) The district court correctly concluded that § 27-1-739(3), MCA superseded the general negligence loss of chance pattern instruction that Camen tendered. (Trans. 1655; GEC App. 71.)

Camen's proposed loss of chance instruction misstates Montana law regarding medical negligence claims. The instruction bears little resemblance to § 27-1-739, MCA as Camen now argues. (Trans. 1641-42; GEC App. 68.)

Camen relies on *Aashiem v. Humberger*, a 1985 decision superseded by § 27-1-739, MCA. *Aashiem*, 2015 Mont. 127, 695 P.2d 824 (1985) (cited in Camen's brief at 16, 29, 31.) Twenty years after the *Aashiem* decision, the Legislature enacted § 27-1-739, MCA. That statute now controls the specific parameters for loss of chance in medical malpractice actions. Camen erroneously attempts to replace a medical malpractice loss of chance rule – one that was specifically adopted and enacted by the Montana legislature – with a less stringent, more generic general negligence loss of chance instruction that clearly does not apply to medical negligence cases or § 27-1-739, MCA.

Finally, Camen's experts' testimony does not meet the requirements to trigger § 27-1-739, MCA. Dr. Lefkowitz testified that, by the time Dr. Stein first saw Camen, "there was very little functioning optic nerve left." (Lefkowitz Perpetuation Depo. 89; GEC App. 130). Dr. Lee testified that a substantial portion of patients who have IIH are left with severe vision loss and functional blindness despite receiving timely and appropriate medical care. (Lee Perpetuation Depo. 112-13; GEC App. 113.) Dr. Lefkowitz testified Camen had permanent, irreversible vision damage long before Camen first saw Dr. Stein. (Lefkowitz Perpetuation Depo. 76; GEC App. 129.) This testimony confirms Camen had no chance of "recovering", so § 27-1-739, MCA was never triggered.

II. The District Court Did Not Abuse its Discretion in Addressing Camen's Objections to Dr. Wheeler's Testimony.

Dr. Wheeler testified as KRMC's standard of care medical expert. KRMC disclosed Dr. Wheeler as a hybrid witness given his credentials and firsthand knowledge and involvement in Camen's treatment. (KRMC expert witness disclosure; GEC Expert Witness Disclosure; GEC App. 268-69, 272.) Dr. Wheeler testified to the chronology of his involvement in Camen's treatment. Dr. Wheeler explained his disagreement with Dr. Lee's characterization of Camen as a fulminant IIH patient and criticism that Dr. Wheeler should have arranged for immediate surgery. (Trans. 1324; GEC App. 60.) Explaining the course of treatment, Dr. Wheeler defended his medical judgment that Camen "deserved a chance to have

medical therapy" to determine whether the medication would effectively treat his symptoms, rather than proceed with shunt surgery that would present significant risks for the rest of his life. (Trans. 1325; GEC App. 60.)

During questioning by his own counsel, Dr. Wheeler explained the chronology of Camen's care, which included a scheduled visit to Dr. Stein two days after Dr. Wheeler saw the patient. (Trans. 1331; GEC App. 61.) Dr. Wheeler agreed that it was "reasonable and appropriate for Dr. Stein to then begin, for the first time, his evaluation and assessment of the patient." (*Id*.) After the district court overruled Camen's objection to that testimony, Dr. Wheeler continued to recount the chronology of his involvement in the patient's care by describing Dr. Wheeler's conference with Dr. Stein on January 9, and his assessment that the collaboration of the doctors was reasonable under the circumstances. (*Id*. at 1331-32; GEC App. 61-62.)

Camen now cherry-picks Dr. Wheeler's statement concerning Dr. Stein's assessment of Camen on January 5 and mischaracterizes it as impermissible ophthalmology standard-of-care testimony. (Camen's brief at 37.) When the question is considered in the context of the subject of Dr. Wheeler's testimony, however, the purpose becomes apparent: the testimony offered Dr. Wheeler's neurology perspective concerning the reasonable timing of an ophthalmologic evaluation. It constituted neurology standard of care testimony confirming Dr.

Wheeler did not delay consult with an ophthalmologist. His testimony was not testimony supporting the standard of care of an ophthalmologist.

Dr. Wheeler was disclosed as a hybrid expert. (GEC's Expert Disclosure pp 10-11, KRMC's expert Disclosure p 6; GEC App. 268-69, 272). There was no unfair surprise in the testimony offered by Dr. Wheeler, only facts easily accessible in the records.

Even if Dr. Wheeler's testimony concerning Dr. Stein's examination of Camen on January 5 exceeded the scope of his expert disclosure, the testimony was harmless. It did not directly relate to Camen's allegations against Dr. Stein. Neither Camen nor Camen's experts ever contended Dr. Stein was negligent because he did not see Camen sooner.

Moreover, Dr. Stein established his compliance with the standard of care. Dr. Stein provided a detailed and thorough account of the reasonableness of his conduct, which, aided by Dr. Lee's testimony acknowledging the necessity of ruling out other possible causes of intracranial hypertension prior to proceeding with a permanent shunt placement, fully support the jury's determination that Dr. Stein was not negligent. (Lee Perpetuation Depo. at 108, 133; Trans. 989, 1006-1007; GEC App. 112, 116, 47, 51.) Dr. Wheeler's brief comment was proper and was inconsequential regarding Dr. Stein's compliance with the standard of care.

III. The Trial Court Properly Polled the Jury in Accordance with Montana Law.

Camen erroneously claims the trial court erred by polling the jury in a manner that did not comply with § 25-7-501, MCA. The record proves otherwise. Even if the trial court's questioning of the individual jurors had not complied with § 25-7-501, MCA, any error is harmless and does not necessitate reversing the jury verdict.

A. Camen failed to preserve an objection to the polling procedure.

As a threshold matter, Camen waived his objection to polling by waiting until all 12 jurors answered both of the district court's questions before voicing his objection. (Trans. 1996; GEC App. 89.) The court summarized the discussion of polling procedure that had occurred (Trans. 1737-38, 1745; GEC App. 80, 82) and properly overruled Camen's objection, both because Camen's counsel appeared satisfied with the court's reasoning expressed the evening before and no additional objection was raised before polling and because the court determined that the poll was sufficient. (Trans. 1998-99; GEC App. 89.) Camen failed to preserve this allegation of error for this Court's review. *See Turk v. Turk*, 2008 MT 45, ¶ 16, 341 Mont. 386, 177 P.3d 1013.

B. The trial court complied with § 25-7-501, MCA.

The trial court met the statutory requirements as outlined by § 25-7-501, MCA. After the verdict is given, either party may request polling, involving the court or clerk asking each juror about the verdict to ensure there is no disagreement that it

constitutes the verdict of at least two-thirds of the jurors. § 25-7-501(2), MCA. If more than one-third of the jurors disagree with the verdict, then the jury must continue to deliberate; however, if two-thirds of the jury agrees with the verdict, then the verdict stands, and the jury is discharged from the case. § 25-7-501(2), MCA; *see also Pumphrey v. Empire Lath & Plaster*, 2006 MT 99, ¶ 31; 332 Mont. 116, 135 P.3d 797.

Here, the district court satisfied § 25-7-501(2), MCA. Camen requested the court to poll the jury. (Trans. 1990; GEC App.87.) The district court explained jury polling and its purpose – to determine "whether each member of the jury agrees that the verdict that was just read in open court is, in fact, reflective of the jury's decision." (Trans. 1990-91; GEC App. 87.) *See also Martello v. Darlow*, 151 Mont. 232, 236, 441 P.2d 175, 177 (1968) (explaining that "[i]n Montana the polling of the jury is a statutory right the purpose of which is to determine whether the required number of jurors concur in the verdict" and that this is the only purpose of the poll). Following the procedure the district court previously advised the parties it would employ (Trans. 1737-44; GEC App. 80-82), the district court asked each juror two questions: (1) "is this the jury's verdict?" and (2) "did at least eight of the jurors agree on the answer?" (Trans. 1991; GEC App. 87.) All twelve jurors unanimously answered both questions in the affirmative. (Trans. 1991-95; GEC App. 87-88.) This method of polling meets the requirements of §25-7-501, MCA.

The only purpose of polling jurors recognized under Montana law is to determine whether the required number of jurors – two-thirds – agree that the verdict reflects the jury's decision. *Martello*, 151 Mont. at 236, 441 P.2d at 177. Camen cites inapplicable cases from other jurisdictions in an attempt to support his position that the district court should have asked each juror to confirm his or her individual vote. (Camen's Brief pp 43-44.) However, the right to poll the jury is established by Montana statute; the procedures of other jurisdictions and case law of those jurisdictions that do not interpret the Montana statute are not instructive. Further, Camen's citation of out-of-state cases lends no support to his argument because (1) the courts of those jurisdictions found the alleged polling error to be harmless,[7] (2) the facts of those cases are readily distinguishable from the present case,[8] or (3) the error occurred in a criminal case where the potential loss of liberty requires jury unanimity.[9] As the requirements of Montana law were satisfied in receiving the

[7] *See Ragusa v. Lau*, 575 A.2d 8, 12 (N.J. 1990); *Ferry v. Checker Taxi, Co., Inc.*, 520 N.E.2d 733, 739-40 (Ill. App. Ct. 1987)

[8] *See Acosta v. Pendleton Memorial Methodist Hospital*, 545 So.2d 1053, 1058-59 (La. Ct. App. 1989) (trial court improperly inquired of each juror as to his or her opinion on a specific interrogatory in violation of Louisiana procedure); *White v. Seaboard Coast Line R. Co.*, 229 S.E.2d 775 (Ga. Ct. App. 1976) (Georgia law requires a unanimous verdict for civil cases and one of the jurors voiced his dissent with the verdict); *Highfield v. Liberty Christian Academy*, 528 N.E.2d 592 (Ohio Ct. App. 1987) (Ohio law does not allow for polling on a potential mistake in an interrogatory on damages).

[9] *State v. Milton*, 840 A.2d 835 841 (N.J. 2004); *State v. Pare*, 755 A.2d 180 (Conn. 2000).

jury's verdict and polling the jury, the district court properly complied with § 25-7-501(2), MCA.

C. Even if the trial court erred in the manner of questioning each individual juror, this error, if any, was harmless.

Even if this Court finds a technical flaw in the polling, it did not substantially affect Camen's right on the merits of the case and does not require reversal.

In *Martello*, the plaintiff brought a negligence action against two defendants. 151 Mont. at 233, 441 P.2d at 175. The plaintiff filed a motion for a new trial and the trial court denied the motion on all grounds except that an error of law occurred in trial court's refusal to grant the plaintiff's request to poll the jury. *Id.* at 234, 176. The defendants appealed, arguing that any error in refusing to poll the jury was harmless and did not warrant a new trial. *Id.* This Court explained that a party has a statutory right to poll the jury for the purpose of determining if "the required number of jurors concur in the verdict". *Id.* 236, 177. This Court found "absolutely nothing in the record to suggest that the verdict was not a true and legal verdict concurred in by the required number of jurors." *Id.* Thus, this Court held that "the error, if any, in refusing plaintiff's request to poll the jury was harmless, and did not materially affect plaintiff's substantial rights and that the district court abused its discretion in granting a new trial based on this ground alone." *Id.*

So too, in the present case, any technical error in the language posed by the district court to the jurors was harmless. The district court's questions served their

intended purpose – to confirm that that the verdict was the true and legal verdict concurred by the required number of jurors. The record clearly demonstrates the statute's purpose was served. (Trans. 1991-95; GEC App. 87-88.) The possibility of harmful error is even more remote here, because the jurors were actually polled after rendering the verdict, unlike the jurors in *Martello*. Thus, the alleged error in the phrasing of the questions was harmless and does not justify reversing the judgment for Defendants.

This Court's decision in *Pumphrey* also demonstrates the absence of prejudicial error here. 2006 MT 99, ¶ 31, 322 Mont. 116, 135 P.3d 797. The jury in *Pumphrey* returned a verdict for the plaintiff. *Id.* ¶ 12. There was dispute regarding the appropriateness of the jury polling conducted by the court following the verdict. After entry of judgment, the defendant appealed. *Id.* ¶¶ 15, 27. This Court found that the improper polling of the jurors after they had been discharged constituted only harmless error and did not warrant a new trial. *Id.* ¶¶ 36-37. The Court explained that it would "not reverse a district court that reaches the correct result, even if for the wrong reason." *Id.* ¶ 37.

By contrast, here the jury rendered a verdict for Defendants, the district court properly polled each jury member, and all twelve jurors individually answered that the verdict was the verdict of at least eight jurors. (Trans. 1991-95; GEC App. 87-88.) At no time during polling or post trial did any juror express confusion

concerning the questions asked and Camen has not presented any evidence to even suggest that less than eight jurors agreed on both questions they answered.

Camen speculates that coercion occurred during jury deliberations because the jury deliberated on two different days. (Camen's Brief p 46.) Camen cites an inapplicable Seventh Circuit case, *Verser v. Barfield*, 741 F.3d 734, 738 (7th Cir. 2013), for the principle that jury polling serves to determine whether any juror was coerced. (Camen's Brief pp 45-46.) However, *Verser* is factually distinguishable, as that case involved a *pro se* plaintiff who was not present when the jury verdict was rendered and the jury was discharged, which in turn prohibited him from even asking if the jury could be polled. 741 F.3d at 737-38. Here, not only was Camen present during the reading of the verdict and polling of the jury, but also, nothing in the record suggests that anything untoward occurred during the jury deliberation or during the evening break. All of the jurors answered the questions that this was the jury's verdict and at least eight jurors agreed with the verdict in compliance with Montana Law. (Trans. 1991-95; GEC App. 87-88.) No one indicated that this was not the jury's verdict or that a juror was coerced. (*Id*.)

CONCLUSION

Camen failed to show that any error, much less prejudicial error, occurred. Camen presents no reason to disturb the verdict reached after the jurors dedicated more than a week of their lives to hearing the evidence and conscientiously deciding

this case. The record proves Camen received a fair trial. This Court should affirm the trial court's judgment.

DATED this 21st day of December 2022.

DONOHUE BROWN MATHEWSON
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27, M.R.App.P., I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Word, is not more than [10,000 (principal brief) or 5,000 (reply or amicus brief)] words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

DATED this 21st day of December, 2022.

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Dated: 12-21-2022